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IN THE

Supreme Court of the United States

October Term, 1984

MICHAEL BENDER, *et al.*,

Petitioner,

v.

THE WILLIAMSPORT AREA SCHOOL DISTRICT, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS ON BEHALF OF ITSELF, THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL, THE COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, INC., AND REPRESENTATIVE DON EDWARDS

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Interests of the Amici

The American Jewish Congress is a membership organization of American Jews founded in 1918 to protect the religious, political and civil rights of Jews and to promote the principles of democracy. It is committed to the preservation of the great freedoms secured by the First Amendment and especially the freedoms secured by its Establishment and Free Exercise clauses. It is particularly, concerned that these freedoms be protected and observed in our nation's public schools.

This brief is also submitted on behalf of the National Jewish Community Relations Advisory Council, and its following national member agencies: B'nai Brith International, Hadassah, Jewish Labor Committee, Jewish War Veterans of the U.S.A., National Council of Jewish Women, Union of American Hebrew Congregations, Union of Orthodox Jewish Congregations of America, United Synagogue of America — National Women's League for Conservative Judaism, Women's American ORT, and the 113 Community Member Agencies representing all major Jewish communities in the United States. These communities are listed in Appendix "A." As a religious minority in an overwhelmingly Christian nation, the Jewish community believes that the principle of separation of church and state is a valuable bulwark in maintaining its status as political and civil equals in American society. Most particularly, it recognizes that the existence of the non-sectarian secular public schools has enabled many Jewish children to be educated in an atmosphere for the most part free of religious bigotry, division and contention and has contributed significantly to the ability of both the Jewish community and individual Jews to enjoy the full promise of American society.

The Committee for Public Education and Religious Liberty, Inc. is a coalition of organizations, listed in Appendix B, sharing the common objectives of preserving religious freedom and the separation of church and state in public education.

As Chairman of the House Judiciary Subcommittee on Civil and Constitutional Rights, Representative Don Edwards is interested in this case for a number of reasons. The Subcommittee has jurisdiction over First Amendment issues, including free speech and religious liberty. During the last Congress, the Subcommittee conducted hearings on religious activities in public schools, including legislation to require public secondary schools to afford "equal access," within constitutional bounds, to any group of students seeking to meet on school grounds. He believes that this case will provide further guidance on the parameters of such activities.

The amici have frequently participated in litigation challenging sectarian involvement in the public schools. Because they believe that permitting religious clubs to meet in public high schools during the hours of compulsory attendance would promote an impermissible atmosphere of religious partisanship and division, wholly violative of the spirit and letter of the Establishment clause, they respectfully submit this brief with the consent of the parties.

Statement of Facts

This is an action brought by a group of public high school students challenging the right of school administrators to exclude a student prayer club from meeting in a public school classroom, under official school supervision, as part of a student activity period during mandatory school hours.

Williamsport High School has designated half-hour periods for student club activities twice each week beginning 15 minutes after the start of the official school day (J.A. 68, 107), when students are by state law under the school district's supervision (J.A. 85, 96, 102). Every student club which meets during the activity period must receive official approval from the school administration first (J.A. 64), and be supervised by an advisor who is either a faculty member (J.A. 64, 69) or a person hired by the school district to perform that function (J.A. 83, 96). All students must either attend a student club, remain in their homeroom, or go to the school library during the activity period (J.A. 102-03).

The Williamsport School District has delegated responsibility for supervision of student clubs to the high school principal (J.A. 89). Williamsport High School's policy is to allow students to suggest topics for new clubs, subject to the official approval of the school's administrators (J.A. 64, 66). The principal's policy regarding proposed new clubs is that "[a]ny student activity or club which is considered to contribute to the intellectual, physical, or social development of the students and is otherwise considered legal and constitutionally proper would likely be approved as an officially sponsored and sanctioned school activity" (J.A. 104). Thus, approval of suggested clubs is not automatic; the school retains the prerogative of rejecting clubs on a case-by-case basis, and clubs which are approved are considered to be "sponsored and sanctioned" by the school.

The selection of faculty advisors for student clubs is based on the connection between a faculty member's background and the subject matter of the club (J.A. 144). Therefore, the school attempts to provide each club with an advisor who has evinced a particular interest in the club's activities. Faculty advisors are expected to play an active role in the conduct of clubs, assisting students (J.A. 83) and keeping the administration informed of the club's activities (J.A. 76).

In September, 1981, a group of students at Williamsport High School requested permission to form a club which would meet during the student activity period to pray, read from scripture, and conduct other religious activities (J.A. 46). At the time that this request was made, approximately twenty-eight student clubs had been approved to function during the activity period.[1] None of the previously-approved clubs dealt with political, philosophical, religious, or controversial subjects (J.A. 65). All of the clubs were of the traditional, non-divisive type common to American public high schools, and are fully described in J.A. 107-141.

The high school principal allowed petitioners' group to meet once in order to allow it to determine its purpose more clearly (J.A. 74). When the group subsequently advised the principal of its desire to meet regularly during the club period for prayer and Bible reading with a faculty advisor, he refused to approve the activity, pend-

1. The active clubs sponsored by the school consisted of the Student Government, Key Club, Class Organizations (student class officers and executive board), Library Club, Business English Club, Future Homemakers of America, Vo-tech Club, Speech and Drama Club, Ecology Club, The Cherry and White (student literary magazine), Billtown Banner (student newspaper), La Memoire (student yearbook), Bank, and Choir. Past approved clubs consisted of: Archery, Art, Audubon, Aviation, Chemistry, Chess, Field, Forest and Stream, Future Nurses, Future Teachers, Bowling, German, Poetry, Photography, and Ski clubs (J.A. 103-04).

ing further advice from the district superintendent and solicitor, on the basis that such activities in the context of the school activity period might be unconstitutional (J.A. 74, 87). The students' request was referred to the superintendent, who refused to sanction the prayer club, relying upon the district solicitor's written legal opinion that the proposed activity would violate the Establishment Clause of the First Amendment (J.A. 39, 92-93).

This decision and the rationale therefor were affirmed by the Williamsport School Board upon appeal by the students, and this litigation ensued.

Summary of Argument

The Court of Appeals for the Third Circuit held that the Williamsport school authorities, by the operation of the student activity period, created a limited public forum and, therefore, petitioners had a free speech right to conduct a prayer club at the school. The Court of Appeals also held, however, that the Establishment Clause interests implicated by such a club outweighed any such free speech rights.

We agree with the Court of Appeals that a prayer club in a public school under school supervision during mandatory school hours violates the Establishment Clause. The Establishment Clause issue need not be reached, however, because the Williamsport activity period did not constitute a limited public forum and, thus, petitioners had no constitutional right to conduct their club during that activity period.[2]

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2. In the District Court, petitioners took the position that they had a Free Exercise right to conduct a prayer club during the activity period. They appear to have abandoned that argument and now base their claim solely on the Free Speech clause of the First Amendment.

ARGUMENT

I.

The School District Did Not Violate Petitioners' Free Speech Rights Because the Student Activity Period Did Not Constitute a Limited Public Forum.

A. The Public Forum Doctrine Is Essentially Incompatible With the Mission and Operation of a Public School, and No Such Forum Should Be Found to Exist Absent Compelling Evidence

The core principle of the First Amendment—that the government may not suppress or punish the expression of offensive ideas—unquestionably applies in the nation's public schools. *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969).

Petitioners' free speech claim, however, does not rest on this core principle.[3] What petitioners seek to do here is to transplant a limited branch of First Amendment jurisprudence—the public forum doctrine—into the high school setting.

This Court has never held that the public forum doctrine or a "limited" public forum doctrine applies to the edu-

3. I.e., this is not a case in which school officials punished students for the expression of offensive views (*see Tinker* v. *Des Moines Independent Community School District, supra*), or coerced students into committing acts or expressions which are inconsistent with the students' fundamental political or religious beliefs (*see West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943)), or discriminated in favor of or against personal viewpoints within already-approved subject matters (*see Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37 (1983); *Board of Education, Island Trees Union Free School District* v. *Pico*, 457 U.S. 853 (1982)).

cational program of public high schools.[4] Nor should it, for such a holding would seriously diminish the ability of local school officials to fashion the content of a school's educational program.

This Court has recognized that there are situations in which the particular use of state property is incompatible with the assumption of unlimited expression which underlies the public forum doctrine. *E.g., Greer* v. *Spock,* 424 U.S. 828 (1976). The operation of the public schools is one such situation. That is because local school districts must continue to enjoy the broad and constitutionally-protected authority this Court described in *Board of Education, Island Trees Union Free School District* v. *Pico,* 457 U.S. 853, 863-64 (1982) (plurality opinion, citations omitted):

> [L]ocal school boards have broad discretion in the management of school affairs . . . . [this Court has] . . . "repeatedly emphasized . . . the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools."

The Court in *Pico* also agreed that since the public schools are

> vitally important "in the preparation of individuals for participation as citizens," and as vehicles for "inculcating fundamental values necessary to the maintenance of a democratic political system" . . . local school boards must be permitted "to establish and apply their curriculum in such a way as to transmit community values," and . . . "there is a legitimate

4. The Court has, in fact, implied the contrary. *Perry Education Assn., supra,* 460 U.S. at 44; *Grayned* v. *City of Rockford,* 408 U.S. 104, 117-118 (1972). More generally, this Court has made clear that merely because students retain their constitutional rights while attending public school, does not mean that every subordinate principle of this Court's general constitutional jurisprudence applies in that setting. *See, e.g., New Jersey* v. *T.L.O.,* 105 S. Ct. 733 (1985).

> and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political." *Pico*, 457 U.S. at 864 (plurality opinion, citations omitted).

The plain fact is that local school officials practice content-based discrimination every day, and do so without violating the First Amndment, for it is they who decide which subjects are appropriate for the educational program and which are not. Their authority to do so should not be limited to the academic aspects of the program. In order for the school to carry out its overall mission of "inculcating fundamental values," value judgments as to the content of school-sponsored activities such as clubs and plays must also be made.[5]

There are thus sound reasons which support a strong presumption that the public form doctrine should rarely be interposed into the public school setting. If a high school activity is deemed to constitute a limited public forum, the authority of school officials to prescribe the content of that activity will have been virtually eliminated. High school students, and not the officials who are supposed to run the school, would become the arbiters over the contents of the activity.

For this reason, petitioners' reliance upon *Widmar* v. *Vincent*, 454 U.S. 263 (1981), is misplaced. The mission of state universities differs profoundly from the mission of public high schools. State universities possess a central characteristic of the quintessential public forum: they are devoted to the fullest measure to free and unrestrained

5. *See, e.g., Seyfried* v. *Walton*, 668 F.2d 214 (3d Cir. 1981). Of course public school authorities do not have unfettered discretion in carrying out their function of inculcating fundamental or community values. The exercise of that discretion is limited by constitutional guarantees, such as the Establishment Clause (see Argument II, *infra*) and this Court's free speech decisions applicable in the public school setting (see note 3, *supra*).

expression and have historically operated as "the marketplace of ideas." *Healy* v. *James*, 408 U.S. 169, 180 (1972). *See Widmar, supra*, 454 U.S. at 267 n. 5; *Gay Lib* v. *University of Missouri*, 558 F.2d 848, 857 (8th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978).[6] In *Widmar* there were over 100 recognized student clubs blanketing the spectrum of social, philosophical and political inquiry and advocacy. *See* 454 U.S. at 274. The university could not have endorsed, and could not be perceived as having endorsed, the contrariety of principles espoused by all of those clubs. The only principle it endorsed was that student speech and debate at the university should be "uninhibited, robust and wide-open." *Cf. New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964).

In light of these distinct missions and philosophies, decisions respecting public forums at state universities cannot be transplanted into the public school setting.[7] In pressing this point, we do not suggest that a "limited public forum" can *never* exist in a public high school. Public school officials, within the narrow limits of the statutes governing them, may relinquish some of their authority over content in favor of unlimited student ex-

6. *See also, e.g., Regents of the University of California* v. *Bakke*, 438 U.S. 265, 312 (1978) (Opinion of Powell, J.); *White* v. *Davis*, 13 Cal. 3d 757, 533 P. 2d 222, 231, 120 Cal. Rptr. 94 (1975) ("the campus is the sacred ground of free discussion"); O'Neil, *God and Government at Yale: Federal Regulation of Higher Education*, 44 U.Cin.L.Rev. 525, 545 (1975) ("the climate of academic freedom at a college or university is much more than simply the aggregate of individual civil liberties").

7. The public forum issue has ramifications that go far beyond the instant case. In the instant case the Establishment Clause will prohibit religious clubs (See Argument II, *infra*), even if a limited public forum is held to have existed in Williamsport High School. There is, however, no comparable constitutional restraint to prevent a neo-Nazi club, or a KKK club, or any extremist political club. Such a judicial diminishment of the local school officials' comprehensive control over what goes on in our public schools, will disable them from carrying out their most essential functions, as described by this Court in *Pico, supra*.

pression. However, courts should not assume that school authorities have relinquished their authority. On the contrary, courts should presume that they have not done so, and should place a heavy burden of proof on those who claim otherwise. *See, e.g., Jarman* v. *Williams*, 753 F.2d 76 (8th Cir. 1985); *Seyfried* v. *Walton*, 668 F.2d 214 (3d Cir. 1981); *Buckel* v. *Prentice*, 572 F.2d 14 (6th Cir. 1978).

The Court of Appeals plainly erred in its evaluation of the public forum issue. The initial question is not whether this Court's decisions "preclude" the existence of a limited public forum in the Williamsport High School. *Bender* v. *Williamsport Area School District*, 741 F.2d 538, 548 (3d Cir. 1984). This formulation turns the issue on its head, and fails to grant local school authorities the judicial deference to which they are entitled. The Court of Appeals should have accorded a heavy presumption against the existence of a public forum and should have reviewed the record on the basis of that presumption. Had it done so, it could not have concluded that the Williamsport school authorities abandoned their right to control the content of clubs operating during the student activity period.

B. Petitioners Did Not Meet Their Burden of Demonstrating the Presence of an Open Forum for Student Self-Expression

The Court of Appeals rested its limited public forum holding in part on the fact that the clubs were not part of the school's "formal curriculum." *Bender, supra*, 741 F.2d at 549. By thus limiting "curriculum" to specific instructional subjects, the Court erroneously defined it in an overly limited and mechanistic manner. If that definition is affirmed by this Court, it will require school officials throughout the country to make the choice between eliminating all school programs not directly related to specific instructional

subjects, or relinquishing to students the right to determine the content of such programs.

The Court of Appeals failed to give recognition to the fact that when school officials sponsor programs outside the classroom they do not intend to create thereby a wide-open "free time" period over which they no longer exercise control. As noted above, their authority extends beyond the purely academic, informational, aspect of their programs and encompasses as well the socializing function. *Pico,* 457 U.S. at 864. Moreover, in this case the activity period was structurally imbedded within the educational program at Williamsport High School;[8] it was not a mere adjunct thereto.

The Court of Appeals also critically erred in assuming that since no club other than Petros had ever been rejected by the school, the school officials must have abandoned all control over the substance of the activity period, delegated their authority to students, and created an open "forum for self-expression." *Bender, supra,* 741 F.2d at 548. This assumption is not supported by any finding of fact, and is refuted by the record.

The clubs which previously had been approved did not comprise a wide-open forum for unlimited student discussion. Each was tied to instructional subjects or advanced mental or physical skills, or performed public or school services. Each was of the traditional, non-divisive and non-controversial sort that one finds in public schools all over the country. Unlike *Widmar,* the Williamsport High School had no political, philosophical or religious clubs.

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8. The school district determined that the period should take place during mandatory hours, in regular classrooms, and under the active supervision of teachers. The school required that attendance be taken at club meetings, and reserved the right to approve the subject matter of clubs as they were proposed. Teacher-monitors were required to report any improper conduct which occurred during the club period. (J.A. 64, 69, 76, 83).

The Williamsport school officials reserved the right to reject any proposed student club.[9] Had the school officials specified in advance permissible club subjects, it could not be argued that an open-ended forum was either intended or created. Yet there is no real distinction between such a policy and the Williamsport school district's approach of allowing students to suggest topics subject to school approval. That the district permitted students this initiative does not suggest in the least that it intended to surrender its discretion to reject any club it deemed inappropriate. To take but one obvious example, had a student group proposed an extremist political club, nothing in this record suggests that Mr. Newton would have approved that club. The fact that Mr. Newton had actually not rejected any club proves only that no controversial club had yet been suggested.

The facts therefore are as follows: the approval of school officials was required, they had granted that approval to a number of traditional and non-controversial clubs, and they retained the right to reject clubs they determined to be inappropriate. There is no specific finding of fact by the lower court to the contrary. This aspect of the case is therefore governed by *Perry Education Assn., supra,* which presented almost identical facts. In *Perry,* the school officials had permitted a certified union and a variety of public interest groups to use the school's internal mail system. No group had been denied access before a rival union submitted its request to use the facility. When the rival union was denied such permission, it claimed that the school's access

9. According to Principal Newton, "any student activity or club which is considered to contribute to the intellectual, physical or social developments of the students and is otherwise considered legal and constitutionally proper *would likely* be approved *as an officially sponsored and sanctioned school activity.*" (J.A. 104, emphasis added). This careful statement does not reflect an abdication of authority. Instead, Mr. Newton clearly retained the right to veto proposed clubs which he thought inappropriate "as an officially sponsored and sanctioned school activity."

policy regarding the mail system had created a limited public forum. The Court rejected this claim, relying upon certain factual characteristics shared by the activity period here:

> [T]here is no indication in the record that the school mailboxes and interschool delivery system are open for use by the general public. Permission to use the system to communicate with teachers must be secured from the individual building principal. There is no court finding or evidence in the record which demonstrates that this permission has been granted as a matter of course to all who seek to distribute material. We can only conclude that the schools do allow some outside organizations . . . to use the facilities. *This type of selective access does not transform government property into a public forum.* 460 U.S. at 47 (emphasis supplied).

Finally, the Court of Appeals observed that a few of the student clubs discussed subjects not apparently related to the school's formal instructional subjects. The Court cited the Key Club (a public service club), the Chess Club, the Aviation Club and the Office Aides as examples of "non-curricular" student groups which had been approved. At the same time, however, the Court correctly observed that these clubs could be considered "curricular" in the sense that they furthered the achievement of the school's overall mission.

The relationship between the existing clubs and the instructional subjects is of little, if any, constitutional significance. School officials must be able to promote some clubs not specifically related to instructional subjects, without becoming subject to a constitutional rule that they must grant access to *every* club. Many high schools do not have formal classes in music appreciation, for example. If school officials in one of those high schools endorsed a student-proposed music club, it cannot be that they would there-

upon be required to accept student-proposed political and religious clubs.

The Court of Appeals' mistake was to create a category of student clubs—those not tied to the formal instructional curriculum—and then to conclude that because some clubs within that category had been approved, all clubs within that category must be accepted. This reasoning is contrary to this Court's decisions. *Perry, supra; Greer* v. *Spock,* 424 U.S. 828 (1976). In *Greer* it was argued that because the government had allowed civilians to speak on military bases, all civilians must be granted access, including those who intended to give political speeches. The Court held that it was proper for the government to distinguish among civilians who sought access because political orators presented problems that non-political speakers did not. The touchstone issue in both *Greer* and *Perry* was whether government officials regulating access had legitimate reasons for drawing the distinctions they drew. That is the remaining issue here.

C. The Williamsport School Authorities Had Legitimate Reasons to Refuse to Sanction a Religious Club

The Williamsport school officials had legitimate reasons for concluding that a religious club presents serious problems that are not created by groups like the Key Club, the Chess Club, the Aviation Club and the Office Aides. In a selective forum, in which all approved clubs represent "officially sponsored and sanctioned school activity," school officials understand that official sponsorship of organized religious prayer is quite different from, say, official sponsorship of competition in chess.

School officials also understand the special problems a religious club can present in respect of the appropriate function of the teacher. According to the school district's

policy, each club must be supervised by a faculty advisor or other professional employee of the district (J.A. 64, 83, 96), the advisor for each club is selected "based upon the nature of the particular club and corresponding background of the faculty member" (J.A. 144), and the advisor is to actively assist the students in achieving the objectives of the club (J.A. 83). These policies can be carried out easily with a group like the Chess Club; they cannot be followed in a prayer club without blatantly violating the Establishment Clause. The school district would practice unconstitutional religious discrimination if it selected the faculty advisor for a prayer club based on his or her "corresponding background." And the school district would violate the principles laid down in *Abington School District* v. *Schempp*, 374 U.S. 203 (1963), were a faculty advisor to actively assist students in a prayer ceremony. (*See* Sec. II, *infra*)

School officials also understand the dangers that would be presented if students in a religious club were allowed to publicize their activities through the channels of communications regularly used by all other approved clubs (e.g., the public address system, bulletin boards, and the school yearbook). When used by the Chess Club, these announcements are innocuous. When used by a religious club, they create real dangers of divisiveness and proselytization.

Given these three factors which inhered in approval of a religious club—official endorsement, the role of faculty advisers, and the use of school facilities for publicizing—the Williamsport school officials were concerned that the inclusion of a religious club in the activity period would violate the Establishment Clause. This is a legitimate reason to refuse to sanction a religious club.

Petitioners claim that the school officials are mistaken in their concern about appearing to officially endorse re-

ligious beliefs. We agree with the school authorities on this matter, but whether they were right or wrong is not the issue. In *Greer* v. *Spock*, *supra*, civilian political groups were banned from military bases because their presence was seen by the government as potentially creating the appearance of partisan political influence over the military. The government may have been wrong in this view, but it represented a good faith judgment which the government had the right to make. Similarly, there are ample grounds to support the Williamsport school district's judgment that adding a religious club to an activity period which to that point had not included any controversial clubs whatever, would be viewed as an official endorsement of religion.[10]

Petitioners' response to the other two factors (the role of faculty advisors and the use of school communications facilities) is equally unpersuasive. They apparently agree that if the faculty advisor for a prayer club is selected and acts according to existing school policy, an Establishment Clause violation will result, and understand the problems that would be created if a prayer club advertised through school facilities. They are therefore willing to forego these privileges; they will accept a faculty advisor who acts purely as a passive monitor and they will agree to be prohibited from advertising through school facilities.

The constitutional issue here is whether petitioners have a right of access to the forum *as it exists and as it is operated*. Petitioners have no right to insist that the forum be modified to suit their needs and wishes. In particular, local school authorities may legitimately set policies concerning the selection and role of faculty mem-

10. This is not like *Widmar*, where the university's expressed fear of official endorsement had to be examined in light of the presence of clubs like Students for a Democratic Society and Young Socialist Alliance. *Widmar*, *supra*, 454 U.S. at 274.

bers who supervise student clubs. The school authorities are not required by the Constitution to negotiate modifications of these policies with every student group that wants to form a club.

The question before the Court with respect to the Establishment Clause is whether the prayer club *must* be excluded from the activity period; the question with respect to the public forum issue is whether the prayer club *may* be excluded. If school officials themselves determine that approval of a religious club on school premises would at the very least create a danger of, or give the appearance of, breaching the constitutional separation of church and state, that conclusion is a valid basis for denial of approval. School officials are entitled to make good faith judgments, even if they are in error, about what school programs are illegal and should therefore be prohibited. It is also within their discretion to steer clear of programs which might be illegal, or which verge on the edge of illegality. School officials need not wait to see whether it is possible to have such a club without running afoul of the Establishment Clause. They have the right to decide that it is best not to take the first step in that direction. The role of the judiciary in such circumstances is to decide whether such judgments are made as a pretext to suppress unpopular ideas;[11] it is not to act as an appeal tribunal in order to *de novo* consider whether the school principal or school board was correct in its judgment.

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11. There is no suggestion that the Williamsport school officials denied approval of the prayer club for such reasons.

II.

The Establishment Clause of the First Amendment Prohibits School Officials from Including a Religious Club Among Approved Student Clubs in Which Students Participate During Mandatory School Hours, on School Premises, and Under School Supervision.

The petitioners in this case share the same objective as their predecessors in prior school prayer cases: to introduce organized religious practices into the public schools. The petitioners have attempted to achieve this objective in a novel manner by framing the issue as one implicating the free speech rights of high school students.

As argued in the first section of this brief, petitioners have no such free speech rights to a prayer club on public school premises. If, however, the Court finds that the public forum doctrine is applicable to the public schools, and that Williamsport High School created such a forum, the Establishment Clause interests must nevertheless prevail over such free speech rights.

Once again this Court confronts an effort by citizens to have the public school system sanction prayer and religious practices as appropriate school activities. In prior cases, *e.g.*, *Wallace* v. *Jaffree*, 53 U.S.L.W. 4665 (U.S. June 4, 1985); *Abington School District* v. *Schempp*, 374 U.S. 203 (1963); *Engel* v. *Vitale*, 370 U.S. 421 (1962); *Lubbock Civil Liberties Union* v. *Lubbock Independent School District*, 669 F.2d 1038 (5th Cir.), *cert. denied*, 459 U.S. 1155 (1983); *cf. Stone* v. *Graham*, 449 U.S. 1104 (1981), citizens convinced legislatures or school boards to provide a time for prayer through a statute or policy. In this case, citizens have sought school official approval for prayer meetings initiated by groups of students on

school premises during regular school hours as part of a regular student activity period.[12]

The religious activity at issue here presents precisely those dangers the first Amendment seeks to avoid and this Court's prior decisions prohibit: potential divisiveness along religious lines;[13] the appearance of a governmental imprimatur on religious practices in general, or certain religions in particular; potential religious pressures on youth of impressionable age; substantial risk of proselytization in public schools with the appearance of official approval; and inevitable entanglement of government and religion. Although couched in a different format, this case presents long-standing and well-recognized dangers.

A. This Court's Precedents Proscribe Group Prayer in the Public Schools Undertaken with the Approval and Participation of School District Personnel

This Court has never applied the "religious speech" characterization to group prayer or religious instruction in a public high school. Indeed, the Establishment Clause dangers in that context have been so apparent that the Court has not felt the need to balance potential free speech issues in cases such as *Engel* v. *Vitale, supra; Illinois ex*

12. Congress has attempted to require local school districts to allow prayer clubs. Federal Equal Access Act, 20 U.S.C. § 4071 *et seq.* For the reasons stated herein, that Act is likewise a violation of the Establishment Clause.

13. Petros purports to be non-denominational. In fact, it is Christian, as evidenced by its very name. In any event, non-denominational does not mean non-sectarian, which is the issue of constitutional significance. *Wallace* v. *Jaffree, supra.*

Religious clubs inevitably will divide along religious lines. Religion is, after all, by its nature exclusionary unless outsiders choose to convert. Thus, the public school, the institution designed to harmonize Americans of all creeds, will become instead a forum for religious divisiveness.

rel. McCollum v. *Board of Education*, 333 U.S. 203 (1948); *Abington School District* v. *Schempp*, *supra*; *Wallace* v. *Jaffree*, *supra*. The reasons it has not done so are addressed later in this brief. Here it need only be emphasized that, in the context of public school practices, this Court has invariably subordinated such issues to Establishment Clause concerns. In order to ensure that our public schools remain a unifying force rather than a forum for sectarian competition, this Court has struck down every attempt to introduce organized prayer or religious instruction in the schools.

In *Illinois ex rel. McCollum* v. *Board of Education*, *supra*, the Court held that school officials violated the Establishment Clause by permitting religious classes to be conducted on school premises, even though these classes were initiated and controlled by non-governmental authorities and participation was voluntary. The Court held that public school premises are not to be used for religious activity or instruction.

The *McCollum* principle was confirmed in *Zorach* v. *Clausen*, 343 U.S. 306 (1952), where the Court upheld a released time program under which public school students were dismissed from school early so they could attend off-school ground religious instruction. The change in situs was critical for the Court. *Id.*, 343 U.S. at 308-09. Here the Prayer Club proposes to meet "on school premises" (J.A. 46) during the hours of compulsory attendance, thus seeking to do what *McCollum* found to be constitutionally unacceptable.

In *Engel* v. *Vitale*, *supra*, 370 U.S. at 430, the Court banned the recitation of a nondenominational prayer at the start of the school day, notwithstanding that students who did not wish to participate could be excused from doing so. Petitioners' assertion here that their activities

will be nondenominational and voluntary is thus of no constitutional significance, even if it were true. *See also Abington School District* v. *Schempp, supra.* These principles were most recently affirmed in *Wallace* v. *Jaffree, supra.*

The unifying theme of these decisions is the proscription in *Everson* v. *Board of Education*, 330 U.S. 1 (1947), that "a state [cannot] . . . participate in the affairs of any religious organizations or groups." *Id.* at 16. Yet Petros seeks to be "approved" by the school district, a status which carries with it the appointment of a faculty advisor to advise, assist and report on the group's activities (J.A. 76, 83). Such "active involvement of the sovereign in religious activity," is one of the evils which the Establishment Clause was designed to eradicate. *Pearl* v. *Nyquist*, 413 U.S. 756, 772 (1973), *quoting Walz* v. *Tax Commission*, 397 U.S. 664, 668 (1970).

What petitioners seek—state approval to meet during an officially scheduled club hour—is what this Court's decisions hold they cannot have. It need hardly be added that the foregoing decisions in no way evidenced hostility to religion. It is the very prominence and importance of religion in American life that counsels vigilance against "the myriad, subtle ways in which Establishment Clause values can be eroded." *Lynch* v. *Donnelly*, 465 U.S. ——, ——, 104 S.Ct. 1355, 1370 (1984) (O'Connor, J., concurring).

The principles most applicable to the instant case were stated by Mr. Justice Frankfurter in *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203, 216-217 (1948):

> The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from

> pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered. Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcible pressures by religious groups, of religion from censorship and coercion however soberly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice.

Religious clubs in school threaten to turn the clock back to a period in our nation's history when public schools were the scene and source of sectarian divisiveness. Pfeffer, *Church, State and Freedom*, 321-61 (1967). While the intensity of the religious struggle over the public schools has been lessened by this Court's decisions, persistent efforts to evade this Court's precedents by seeking state approval for organized religious practices in public schools prove the need for continuing judicial vigilance. In this sensitive area, care must be taken because "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand . . . ."[14]

B. The Prayer Club Proposed in This Case Violates the Establishment Clause Under the Tripartite Test Announced in *Lemon v. Kurtzman*

Although this Court's prior decisions are dispositive of this case, the same result is required by application of the

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14. Remarks of Representative Daniel Carroll in the House of Representatives Debate on what was to become the First Amendment. Quoted from A. Stokes & L. Pfeffer, *Church and State in the United States*, 94 (1964).

tripartite test first enunciated as such in *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13 (1971), and restated and applied most recently in *Wallace* v. *Jaffree, supra*. To conform to the Establishment Clause, a practice must have a secular purpose, a primary effect which neither advances nor inhibits religion, and must not excessively entangle government with religion. As the Court of Appeals correctly noted, if *any* of these three standards are violated, the practice violates the Establishment Clause. *Bender, supra* 741 F.2d at 550-51.

1. *Purpose*

In the context of this case, in which the school district seeks to prohibit rather than to allow a religious activity, there is no need for the Court to reach the question of the school district's purpose.[15]

2. *The Primary Effect of Allowing a Prayer Club to Meet in Classrooms During School Hours Under Faculty Supervision Will be to Advance Religion*

There is no doubt that petitioner Morris Braggs was talking about a purely religious activity when he wrote to the school sperintendent "[o]n behalf of the Prayer Club . . . concerning the establishment of a prayer meeting at Williamsport Area High School." (J.A.-41). To facilitate their group worship, he sought the superintendent's approval, and he sought to utilize both the compulsory attendance machinery of state law and the school district's building. As this Court noted in *Lynch* v. *Donnelly*, that is precisely what was prohibited in *McCollum*:

15. While the School District's purpose is not at issue here, such would not be the case in an action brought with respect to the Federal Equal Access Act, 20 U.S.C. § 4071 *et seq*. The legislative history of the Equal Access Act reveals the intent to formulate a statute which would restore prayer activities to the public schools. *Cf. Wallace* v. *Jaffree, supra*.

> "the State had not only used the public school buildings for the teaching of religion, it had 'afford[ed] sectarian groups an invaluable aid . . . [by] provid-[ing] pupils for their religious classes through use of the State's compulsory public school machinery.' "

Lynch v. *Donnelly*, *supra*, 465 U.S. at ——, 104 S.Ct. at 1364 (1984).

A governmental practice whose primary effect so obviously advances religion is unconstitutional, even if the government's purpose is neutral. *Lemon* v. *Kurtzman*, *supra*. An otherwise secular setting does not suffice to justify a practice that has the primary effect of aiding religion. As this Court noted in *Hunt* v. *McNair*, 413 U.S. 734, 743 (1973), "[a]id normally may be thought to have a primary effect of advancing religion . . . when it [supports] a specifically religious activity in an otherwise substantially secular setting." Such is the case here.

The practice urged by petitioners advances religion also because it would be perceived as governmental endorsement of the religion practiced in the club. The public schoolroom is the first opportunity most citizens have to experience the power of government. Because of our compulsory attendance laws, the public school building has become a symbol of government authority, and the teacher has become the embodiment of that authority. The typical school day is carefully structured and controlled. Student activities are closely supervised, and inappropriate conduct is subject to punishment. The implication for students is obvious: conduct which is permitted to take place during the organized school day generally enjoys the approval and support of the school administration. See *Engel* v. *Vitale*, *supra*, 370 U.S. at 431; *Wallace* v. *Jaffree*, *supra*, at n. 51.

Oliver Wendell Holmes once observed, "[w]e live by symbols, and what shall be symbolized by any image of

the sight depends upon the mind of him who sees it." *Collected Legal Papers,* 270 (1920). Holmes' wisdom must be kept in mind when evaluating whether a particular practice is likely to carry with it an implied governmental endorsement of religion, for the answer may well depend upon whether the observer is a member of the majority culture and religion and thus less sensitive to the harms likely to be experienced by the minority.

To be a member of the minority community means to know instinctively the truth recorded by William Aylott Orton:

> Communities of all types, as they have become organized and self conscious, have a tendency also to become closed. The "I belong" tends increasingly to imply "you don't." Consciousness of kind increasingly becomes consciousness of difference. And consciousness of difference tends . . . to be translated in terms of superior and inferior.

The Liberal Tradition: A Study of the Social and Spiritual Conditions of Freedom 19 (1945). If the Establishment Clause is to serve, among other purposes, as a prophylactic device to protect the interest of the minority, it must exert its influence long before most members of the majority recognize the existence of any concrete harm.

Moreover, the practice urged by petitioners advances religion also because of the coercive pressures which inhere in it.[16] Many students do, and should, view teachers as role models and may attend meetings of Petros simply because of their admiration for, or wish to curry favor with, the particular teacher who serves as advisor. Involvement in the club by respected students would like-

16. Those who differ with the majority in matters of conscience are often shunned or singled-out as the special targets of hate. *See,* Note, *Released Time Considered: The New York Plan Is Tested,* 61 Yale L.J., 405, 415 n.54 (1952).

wise increase pressures on others to join. As the Second Circuit observed in *Brandon* v. *Board of Education*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981). "An adolescent may perceive 'voluntary' prayer in a different light if he were to see the captain of the school's football team, the student body president, or the leading actress in a dramatic production participating in communal prayer meetings in the 'captive audience' setting of a school." 635 F.2d at 978 (citation omitted). In short, the natural pressures inherent in the closed, compulsory high school setting would inevitably operate to assist the functioning of a religious club. *Wallace* v. *Jaffree*, *supra*, at n.51.

On this issue too, as they do on the public forum issue, petitioners rely on *Widmar* v. *Vincent*, *supra*. Once again that reliance is misplaced.

The Court in *Widmar*, as it has in other cases,[17] took pains to stress that the case involved college students who "are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion." 454 U.S. at 274, n.14. Both the Second and Fifth Circuits have held in similar situations that this "impressionability" mandated that there may not be official approval of religious clubs. *Brandon* v. *Board of Education*, *supra* at 978; *Lubbock Civil Liber-*

17. *See, e.g., Lemon* v. *Kurtzman*, 403 U.S. at 616; *Tilton* v. *Richardson*, 403 U.S. 672, 686 (1970); *Abington School District* v. *Schempp*, *supra*, 374 U.S. at 297-99 (Brennan, J., concurring). *Cf. Marsh* v. *Chambers*, 463 U.S. 783, 792 (1983) (distinguishing between adults not susceptible to "religious introduction" and children subject to "peer pressure").

Most recently, in her concurring opinion in *Wallace* v. *Jaffree*, *supra*, Justice O'Connor noted that "[t]his Court's decisions have recognized a distinction when government sponsored religious exercises are directed at impressionable children who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs." 53 U.S.L.W. at 4677.

ties Union v. *Lubbock Independent School District*, 669 F.2d 1038, 1045 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983).

Widmar involved college students, for many of whom the campus constitutes home and community. Their day is not spent under the continuous, watchful eye of a school employee. Clear distinctions do not exist to divide school time from non-school time. The range of permissible activity is great, and behavior is subject to neither constant regulation nor affirmative supervision by university authorities. But under state compulsory education laws high school students are legally required to spend a certain portion of their day at school, where their day is carefully structured and controlled (*see* J.A. 105), and their activities closely supervised by teachers with whom they develop special relations. *New Jersey* v. *T.L.O.*, *supra*, 105 S.Ct. 733 at 747 (1985) (Powell, J., concurring).

Moreover, as we argued above, in *Widmar*, a broad spectrum of other permitted activities—such as political clubs of very diverse views—dispelled any inference of university endorsement. Here, where all clubs were either directly related to an academic subject or performed civic services to the school and community, school endorsement is the only logical inference.

Thus, because universities and public schools have student bodies of different levels of impressionability, operate so differently, and have such different missions, a prayer club would not be perceived by university students as governmentally sponsored, whereas it would be so perceived by high school students. That inference is reinforced where school policy requires that a faculty advisor be present and that presence would be interpreted by impressionable students as indicative of school sponsorship. By contrast, in *Widmar*, the religious club was left to

meet on its own without the presence of teachers or other university representatives.

It offends common sense to suggest, as petitioners do, that endorsement by the school would not be presumed.[18]

3. *Allowing Petros to Meet Would Excessively Entangle the School District in Religious Practices*

The Establishment Clause prohibits government involvement with religion where "continuing state surveillance will inevitably be required to ensure that [the] restrictions [of] . . . the First Amendment [are] respected." *Lemon* v. *Kurtzman*, 403 U.S. at 619.

As discussed above, school policy requires that a teacher be assigned as an advisor to each student club. School District officials further testified that state law requires all students to be supervised by a professional employee all day.

This Court in *Widmar, supra*, 454 U.S. at 272 n.11, noted that constant surveillance to ensure a club's non-sectarian nature, involves greater entanglement than would a rule simply permitting such a club to function on its own. Yet in the instant case, unlike in *Widmar*, state law and school policy combine to require precisely such monitoring of religious clubs, and much more: supervision (J.A. 64, 69), an active role in assisting students (J.A. 83), and inform-

18. If instead of a Prayer Club these students had organized a "Playboy Club" is there any doubt that parents would immediately complain about the school district's approval and endorsement of such a club? If such a reaction is to be expected of parents, can one realistically expect students to be able to distinguish between neutrality and endorsement in a public school context? Moreover, perhaps the students presently at Williamsport High School, knowing the origins of the Prayer Club, know that it was student-initiated. A few years from now, however, entering students will only know that the school offers a range of clubs, including a Prayer Club.

ing the administration of the club's activities (J.A. 86). Moreover, the school attempts to provide a teacher advisor who evinces a particular interest in the club's activities (J.A. 144). In this case, as in *Lemon*, "the very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state." 403 U.S. at 620-21.[19]

The students involved in Petros recognized the inherent entanglement problem. They sought to limit its extent by foregoing the use of the school's bulletin boards and public address system to publicize their activities. But as the Court of Appeals observed, this arrangement itself would require surveillance by school officials to ensure compliance. In short, the institutional realities at work in a public high school setting—the "captive audience" created by compulsory attendance, mandatory teacher supervision, and inevitable teacher involvement in student matters—all serve to differentiate this case from *Widmar*, and would lead inevitably to the kind of active participation in religious matters prohibited by the excess entanglement test.

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19. For example, what if members of the Prayer Club differed as to what prayers should be recited, or which version of the Bible should be used? The faculty monitor would inevitably, and inappropriately be drawn into such conflicts.

III.

Conclusion

No public forum was created by Williamsport school officials. Thus, there is no free speech right present in this case. Even if there were, the Establishment Clause interests outweigh any free speech interests in the public school context. The judgment of the Court of Appeals should, therefore, be affirmed.

Respectfully submitted,

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APPENDIX A

Community Member Agencies of The National Jewish Community Relations Advisory Council

Birmingham Jewish Community Council

Greater Phoenix Jewish Federation

Tucson Anti-Defamation—Community Relations Committee of the Jewish Community Council

Greater Long Beach and West Orange County Jewish Community Federation

Los Angeles Community Relations Committee of Jewish Federation-Council

Oakland Greater East Bay Jewish Community Relations Council

Orange County Jewish Federation

Sacramento Jewish Community Relations Council

San Diego Community Relations Committee of United Jewish Federation

San Francisco Jewish Community Relations Council

Greater San Jose Jewish Community Relations Council

Greater Bridgeport Jewish Federation

Greater Danbury Community Relations Committee of Jewish Federation

Greater Hartford Community Relations Committee of Jewish Federation

New Haven Jewish Federation

Eastern Connecticut Jewish Federation

Greater Norwalk Jewish Federation

Appendix A

Stamford United Jewish Federation

Waterbury Jewish Federation

Jewish Community Relations Council of Connecticut

Wilmington Jewish Federation of Delaware

Greater Washington Jewish Community Council

South Broward Jewish Federation

Greater Fort Lauderdale Jewish Federation

Jacksonville Jewish Community Council

Greater Miami Jewish Federation

Greater Orlando Jewish Federation

Palm Beach County Jewish Federation

Pinellas County Jewish Federation

Sarasota Jewish Federation

Atlanta Jewish Federation

Savannah Jewish Council

Metropolitan Chicago Public Affairs Committee of Jewish United Fund

Peoria Jewish Federation

Springfield Jewish Federation

Indianapolis Jewish Community Relations Council

South Bend Jewish Federation of St. Joseph Valley

Jewish Community Relations Council of Indiana

Greater Des Moines Jewish Federation

Louisville Jewish Community Federation

Greater New Orleans Jewish Federation

Appendix A

Shreveport Jewish Federation

Portland Southern Maine Jewish Federation—
Community Council

Baltimore Jewish Community Relations Council

Metropolitan Boston Jewish Community Council

Marblehead North Shore Jewish Federation

Greater New Bedford Jewish Federation

Springfield Jewish Federation

Worcester Jewish Federation

Metropolitan Detroit Jewish Community Council

Flint Jewish Federation

Minneapolis, Minnesota and Dakotas Jewish Comumnity
Relations Council—Anti-Defamation League

Greater Kansas City Jewish Community Relations Bureau

St. Louis Jewish Community Relations Council

Omaha Jewish Community Relations Committee
of Jewish Federation

Atlantic County Federation of Jewish Agencies

Bergen County Jewish Community Relations Council
of United Jewish Community

Cherry Hill Jewish Community Relations Council of
Southern New Jersey Jewish Federation

Delaware Valley Jewish Federation

East Orange Metropolitan New Jersey Jewish
Community Federation

Northern Middlesex County Jewish Federation

Appendix A'

Raritan Valley Jewish Federation

Union Central New Jersey Jewish Federation

Wayne North Jersey Jewish Federation

Albuquerque Jewish Community Council

Greater Albany Jewish Federation

Binghamton Jewish Federation of Broom County

Brooklyn Jewish Community Council

Greater Buffalo Jewish Federation

Elmira Community Relations Committee of Jewish Welfare Fund

Greater Kingston Jewish Federation

New York Jewish Community Relations Council

Pittsburgh Community Relations Committee of United Jewish Federation

Scranton-Lackawanna Jewish Council

Greater Wilkes-Barre Jewish Federation

Provindence Community Relations Committee of Rhode Island Jewish Federation

Charleston Jewish Community Relations Committee

Columbia Community Relations Committee of Jewish Welfare Federation

Memphis Jewish Community Relations Council

Nashville and Middle Tennessee Jewish Federation

Austin Jewish Community Council

Greater Dallas Jewish Community Relations Council of Jewish Federation

Appendix A

El Paso Jewish Community Relations Committee

Greater Houston Jewish Federation

Fort Worth Jewish Federation

San Antonio Jewish Community Relations Council of Jewish Federation

Newport News-Hampton Jewish Federation

Richmond Jewish Community Federation

Tidewater United Jewish Federation

Greater Seattle Jewish Federation

Madison Jewish Community Council

Milwaukee Jewish Council

Central Kentucky Jewish Association

South County (Florida) Jewish Federation

APPENDIX B

Members of the Committee for Public Education and Religious Liberty, Inc.

American Ethical Union

Americans for Democratic Action

American Jewish Committee, New York Chapter

American Jewish Congress

A. Philip Randolph Institute

Aspira

Association of Reform Rabbis of New York City and Vicinity

B'nai B'rith

Citizens Union of the City of New York

City Club of New York

Community Church of New York

Community Service Society, Department of Public Affairs

Council of Churches of the City of New York

Council of Supervisors and Administrators

Episcopal Diocese of L.I., Department of Christian Social Relations

Humanist Society of Greater New York

Jewish War Veterans, New York Department

League for Industrial Democracy, New York City Chapter

National Council of Jewish Women

Appendix B

National Women's Conference of
The American Ethical Union

New York Civil Liberties Union

New York Federation of Reform Synagogues

New York Jewish Labor Committee

New York Metropolitan Chapter, Americans United for
Separation of Church and State

New York Society for Ethical Culture

New York State Americans United for
Separation of Church & State

New York State Congress of Parents and Teachers

New York State Council of Churches

New York Women's Conference of the Society for
Ethical Culture

Public Education Association

Union of American Hebrew Congregations,
New York State Council

Unitarian-Universalist Ministers Association of
Metropolitan New York

United Americans for Public Schools

United Community Centers

United Federation of Teachers

United Parents Associations

United Synagogue of America,
New York Metropolitan Region

Women's City Club of New York

Workmen's Circle, New York Division